

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

EARL TILLIS,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

) Case No. RULE-04-0018

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on November 17, 2004. GERALD L. MORGEN, Member, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Earl Tillis appeared *pro se*. Carol Rembaugh, Human Resource Consultant, represented Respondent Employment Security Department.

1.3 **Nature of Appeal.** This is an appeal alleging a violation stemming from Appellant's reduction in force during his probationary employment period.

## II. FINDINGS OF FACT

2.1 Appellant was an Unemployment Insurance (UI) Specialist 3 serving a probationary period of six months for Respondent Employment Security Department. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on May 5, 2004.

2.2 On April 21, 2004, Dr. Sylvia P. Mundy, Employment Security Department Commissioner, notified Appellant that, due to a lack of funds, his position as a UI Specialist 3 was reduced in force (RIFd), effective at 5 p.m. on May 13, 2004. At the time of the RIF, Appellant had not completed his six-month probationary period and he had not attained permanent status in any other classified positions. Therefore, the department was unable to provide Appellant with any employment options in lieu of layoff.

2.3 On May 7, 2004, Appellant filed a rule violation appeal against the Department of Employment Security alleging numerous violations of the merit system rules related his reduction in force during his probationary periods.

2.4 Appellant does not dispute the department suffered a lack of funds. Appellant argues, however, that it was inappropriate for the department to layoff his position just two days short of his completion of the six-month probationary period. Appellant objects to the agency's use of WAC 356-30-330 to separate him from employment because, as a probationary employee, he had no RIF rights and was ineligible to be placed on any RIF registers. Appellant argues that if he had been allowed to complete his probationary period, and subsequently laid off, he would have attained the right to be placed on a RIF register. Appellant further argues the agency should have transferred him according to WAC 356-30-210 or under WAC 356-30-280.

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2 2.5 Respondent argues the department did not terminate Appellant's employment, as permitted  
3 under WAC 356-30-230, because it was unfair to dismiss him and have a negative employment  
4 action reflected in his personnel file. Respondent asserts that the agency complied with the merit  
5 systems rules by eliminating Appellant's position due to a lack of funds but, because Appellant  
6 never gained permanent civil service status, his name could not be placed on any RIF registers.  
7 Respondent argues that WAC 356-30-210 applies only to permanent state employees and did not  
8 apply to Appellant. Respondent further asserts that a transfer under WAC 356-30-280 was not an  
9 option because the agency was also undergoing a hiring freeze as a result of a lack of funds.  
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### 11 **III. CONCLUSIONS OF LAW**

12 3.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.  
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14 3.2 In an appeal of an alleged rule violation, Appellant has the burden of proof. (WAC 358-30-  
15 170).  
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17 3.3 WAC 356-30-330, reasons, regulations and procedures for reduction in force, indicates as  
18 follows:  
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20 (1) Employees may be separated in accordance with the statutes and the agencies'  
21 approved reduction in force procedures after at least fifteen calendar days' notice  
22 in writing, without prejudice, because of lack of funds or curtailment of work, or  
23 good faith reorganization for efficiency purposes, ineligibility to continue in a  
24 position which has been reallocated, or when there are fewer positions than there  
25 are employees entitled to such positions either by statute or within other  
26 provisions of merit system rules.

(2) When employees have statutory and merit system rule rights to return to the  
classified service, such employees first shall be returned to the classification  
selected. ...

....

1 (emphasis added).

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3 3.4 WAC 356-30-330 does not preclude an appointing authority from reducing in force an  
4 employee during his or her probationary period.

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6 3.5 WAC 356-30-270 provides:

7 (1) An employee may be dismissed during a probationary period after being given  
8 written notice indicating the reasons for the dismissal five working days prior to the  
9 effective date of dismissal. . . .

10 (2) An employee dismissed during a probationary period shall not have the right to  
11 appeal the dismissal. When proper advance notice of the dismissal is not given, the  
12 employee may enter an appeal for payment of salary for up to five days which the  
13 employee would have worked had proper notice been given. If such a claim is  
14 sustained, the employee will be entitled to the appropriate payment of salary but will  
15 not be entitled to reinstatement.

16 3.6 Under WAC 356-30-270, Respondent had the option of terminating Appellant. However,  
17 the appointing authority avoided taking an action against Appellant that would become a part of his  
18 personnel record and potentially viewed by others as a negative employment action. The  
19 department's decision to RIF Appellant during his probationary period clearly caused a great deal  
20 of confusion because Appellant had no RIF rights. Nonetheless, Respondent acted within its  
21 authority to undertake the RIF action. Therefore, Appellant has failed to support his burden of  
22 proving the department violated the provisions of WAC 356-30-330 by separating him due to a lack  
23 of funds.

24 3.7 Appellant provided no evidence to support his argument that the department violated WAC  
25 356-30-280, which allows an employee in a probationary period to be transferred in lieu of a  
26 reduction in force.

1 3.8 The provisions of WAC 356-30-210 apply to the transfer of a permanent employee.  
2 Appellant was not a permanent employee, therefore, this provision of the rule does not apply to  
3 him. Appellant has failed to support his burden of proving the department violated WAC 356-30-  
4 210.

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6 3.9 Appellant's appeal of alleged violations of WAC 356-30-330, WAC 356-30-210, and WAC  
7 356-30-280 should be denied.

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9 **V. ORDER**

10 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Earl Tillis is denied.

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12 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

13  
14 WASHINGTON STATE PERSONNEL APPEALS BOARD

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17 Busse Nutley, Vice Chair

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20 Gerald L. Morgen, Member